Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1999

ANTONIO MEDINA,

PETITIONER,

V.

UNITED STATES OF AMERICA

RESPONDENT,

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(713) 528-1005
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66 pp

QUESTION PRESENTED

1. WHETHER THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS IS VIOLATED WHEN THE GOVERNMENT BREACHES A PLEA AGREEMENT BY REFUSING TO RECOMMEND TO THE TRIAL COURT AT SENTENCING THE LOWER END OF THE GUIDELINES AS SET OUT IN THE WRITTEN PLEA AGREEMENT REQUIRING A NEW SENTENCING HEARING AND REQUIRING THAT THE GOVERNMENT STRICTLY COMPLY WITH THE PLEA AGREEMENT.

CERTIFICATE OF INTERESTED PERSONS

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

V. No. 98-20947

ANTONIO MEDINA

DEFENDANT-APPELLANT

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. United States of America
2. Antonio Medina

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IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, 1999

No. _____

ANTONIO MEDINA,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Antonio Medina, respectfully petitions for a writ of certiorari to review the judgment of the United States Court Of Appeals For The Fifth Circuit in this case.

OPINION BELOW

By its unpublished opinion dated June 17, 1999, the United States Court Of Appeals For The Fifth Circuit affirmed Mr. Medina's conviction and sentence for illegal importation of Freon. No Motion For Rehearing was filed.

JURISDICTION

This was a direct appeal of a sentencing hearing held on October 5, 1998, by the Honorable David Hittner, Judge of the United States District Court for the Southern District of Texas.

This United States Court Of Appeals For the Fifth Circuit had jurisdiction pursuant to Section 1291, Title 28, United States Code, as an appeal from a judgment of conviction and sentence in the United States District Court for the Southern District of Texas, Houston Division, and under Section 3742, Title 18, United States Code, as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. Timely notice of appeal was filed by Defendant-Appellant Antonio Medina on October 15, 1998, and entered on October 18, 1998, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure.

On June 17, 1999, the Fifth Circuit Court Of Appeals, in an unpublished opinion, affirmed the conviction and sentence. No Motion For Rehearing was filed.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor be deprived of life, liberty, or property, without due process of law ...

STATEMENT OF THE CASE

A. The Proceedings Below

On February 23, 1998, an Indictment was returned against Defendant-Appellant in the United States District Court For The Southern District of Texas, At Houston. [Doc. 1].

The indictment originally alleged the following: in Count One, Conspiracy to unlawfully import a Class I controlled substance, to import merchandise contrary to law, to receive, buy, sell, or facilitate the transportation of merchandise knowing it to have been imported contrary to law, and to introduce imported merchandise into the United States by fraudulent declaration, in violation of Title 18, United States Code, Section 371; in Count Two, Receiving and transporting smuggled merchandise, in violation of Title 18, United States Code, Section 545; in Count Three, Entry of goods by means of false statements, in violation of Title 18, United States Code, Section 542; and in Count Four, Violation of requirement and rule relating to stratospheric ozone protection unlawfully importing a Class I controlled substance, in violation of Title 42, United States Code, Section 7413, The Clean Air Act. [Doc. 1].

On July 13, 1998, Defendant-Appellant was re-arraigned and plead guilty to Count 4 of the Indictment. [Doc. 62 at 18]. A Presentence Investigation Report was ordered. [Doc. 62 at 19].

Defendant-Appellant was sentenced on October 5, 1998, to 6 months to serve, followed by 2 years supervised release, a fine of $5,000.00, and 100 hours of community service. [Doc. 54]. Counts one, two, and three were dismissed. [Doc. 48].

Defendant-Appellant's timely Notice Of Appeal was received by the United States Clerk on October 15, 1998, filed on October 15, 1998, and entered on October 18, 1998. [Doc. 58].

B. The Facts

On July 13, 1998, Defendant-Appellant plead guilty to Count 4 of the indictment alleging a knowing violation of the requirement relating to the Stratospheric Ozone Protection Act under the Clean Air Act, Title 42, United States Code, Section 7413(c)(1); 7671c;

Title 18, United States Code, Section 2; and 40 CFR Section 82.4(b). [Doc. 62 at 18].

The penalty range is imprisonment not to exceed five years and/or a fine of not to exceed $250,000. [Doc. 62 at 8].

Defendant-Appellant plead guilty with a written plea agreement. [Doc. 32].

The Assistant United States Attorney stated during the re-arraignment that the Government would recommend a sentence at the lower end of the guideline. [Doc. 62 at 14]. In addition, the written Plea Agreement states,

> "The United States further agrees that if the defendant fully cooperates in providing all information relating to criminal activity known to him, as set out above, that the United States will recommend a sentence at the lower end of the Guidelines." [Doc. 32 at 2].

On October 5, 1998, at the sentencing hearing in this matter, the Trial Court inquired as to what the Government's position was at sentencing and the Assistant United States Attorney stated, "Your Honor, we are not making a specific recommendation. It is accurate that Mr. Medina has talked with the authorities here and in New York." [Doc. 69 at 3]. The Trial Court, after taking into consideration the presentence report, [Doc. 69 at 2], which established a guideline range of 0 to 6 months, [Doc. 44 at 9], sentenced Defendant-Appellant to six months confinement in prison, two years supervised release, 100 hours of community service, and a fine of $5,000. [Doc. 69 at 4].

C. The Appeal

On appeal to the United States Court Of Appeals For The Fifth Circuit, Mr. Medina argued that the Government breached its plea bargain agreement by refusing to recommend to the Trial Court at sentencing the lower end of the Guidelines as set out in the written plea agreement which required a new sentencing hearing and that the Government be required to strictly comply with the plea agreement. The United States Court Of Appeals For The Fifth Circuit rejected this argument holding that Mr. Medina had not demonstrated plain error.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit decision presents an issue worthy of this Court's review: (1) whether the Fifth Amendment's guarantee of due process is violated when the Government breaches a plea agreement by refusing to recommend to the Trial Court at sentencing the lower end of the Guidelines as set out in the written plea agreement requiring a new sentencing hearing and requiring that the Government strictly comply with the plea agreement.

Whether the Government violated the plea agreement is a question of law hinging upon whether the Government's conduct is consistent with the parties' reasonable understanding of the agreement and is reviewed de novo. Because this complaint is raised for the first time on appeal it is reviewed for plain error. *United States v. Price*, 95 F.3d 364 (5th Cir. 1996) (citing *United States v. Esqueda-Moreno*, 56 F.3d 578, 580 (5th Cir. 1995) and *United States v. Wilder*, 15 F.3d 1292, 1301 (5th Cir. 1994)). "The government's breach of a plea agreement can constitute plain error." *Id.* at 1301. However, under Fed.R.Crim.P. 52(b), plain error is only established when the appellant demonstrates the following factors: (1) there was an error; (2) the error was clear and obvious; (3) the error affected the substantial rights of the appellant. *United States v. Calverley*, 37 F.3d 160, 162-164 (5th Cir. 1994)(en banc)(citing *United States v. Olano*, 507 U.S. 725, 730-737, 113 S.Ct. 1770, 1776-79, 123 L.Ed.2d 508 (1993)), *cert. denied*, — U.S. —, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995). *See also*: *United States v. Hernandez*, 17 F.3d 78, 80-81 (5th Cir. 1994).

In this case, clearly the Government has violated the plea agreement. The Government agreed in writing and stated on the record that if Defendant-Appellant would plead guilty and fully cooperate the Government would recommend the lower end of the Guidelines. A recommendation of the lower end of the Guidelines in this instance is tantamount to a recommendation of probation, without confinement. However, when asked for their input, the Government stated to the Court that they were not making a specific recommendation, which constitutes clear error. It is exacerbated by the fact that it sent a message to the Court that Defendant-Appellant had not fully cooperated.

The Trial Court then sentenced Defendant-Appellant to six months confinement, which, compared to no confinement, surely affects a substantial right of Defendant-Appellant.

The Plea Agreement plainly states at paragraph 2:"... The United States further agrees that if the defendant fully cooperates in providing all information relating to criminal activity known to him, as set out above, that the United States will recommend a sentence at the lower end of the Guidelines." And further at paragraph 17: "Whether the defendant has breach any provision of this plea agreement, if contested by the parties, shall be determined by the Court in an appropriate proceeding during which the defendant's disclosures and documentary evidence shall be admissible and during which the United States shall be required to establish a breach of the plea agreement by a preponderance of the evidence." [Doc. 32].

If the Government's position at sentencing was that Appellant had not fulfilled some provision of the plea agreement, the Government has still breached the agreement by not putting Appellant on notice and affording Defendant-Appellant an opportunity to respond.

Defendant-Appellant cites *United States v. Moulder*, 141 F.3d 568 (5th Cir. 1998). "Plea bargain agreements are contractual in nature, and are to be construed accordingly." *Hentz v. Hargett*, 71 F.3d 1169, 1173 (5th Cir.), *cert. denied*, 517 U.S. 1225, 116 S.Ct. 1858, 134 L.Ed.2d 957 (1996); *United States v. Ballis*, 28 F.3d 1399, 1409 (5th Cir. 1994) The Court reviews de novo a breach-of-plea-claim and determines whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement. *United States v. Valencia*, 985 F.2d 758, 761 (5th Cir. 1993).

"The application of contract law to plea agreements is premised on the 'notion that the negotiated guilty plea represents a bargained-for quid pro quo.' " *United States v. Asset*, 990 F.2d 208, 215 (5th Cir. 1993)(quoting *United States v. Escamilla*, 975 F.2d 568, 570 (9th Cir. 1992)).

Even in situations were the government bargains with a defendant to move for a downward departure if a defendant provides substantial assistance the government can bargain away its discretion under the terms of a plea agreement, and thereby obligate itself to give a defendant an opportunity to provide substantial assistance and then move for a downward departure if, in fact, the defendant does provide the substantial assistance, depending upon the wording of the plea agreement. If the plea agreement states the government "will" recommend the government is so obligated. *United States v. Laday*, 56 F.3d 24, 26 & n. 1 (5th Cir. 1995); and *United States v. Melton*, 930 F.2d 1096, 1097-98 (5th Cir. 1991) (concluding that if district court determined on remand that defendant relied on transmittal letter from assistant United States Attorney stating "I will recommend" departure and offered substantial assistance or stood ready to do so, government obligated to move for downward departure).

Defendant-Appellant cites *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995). If a plea agreement exists, and a plea of guilty has been in some way induced by a promise, it is essential to the fairness of the proceeding that the promise be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). This circuit requires the government to strictly comply with the agreements it makes with defendants. *United States v. Chagra*, 957 F.2d 192, 194 (5th Cir. 1992).

Clearly the Government has breached the plea agreement. The Trial Court's findings, on the record, that he had no objections to the presentence report, [Doc. 69 at 2], indicate the Trial Court's acquiescence to the guideline total offense level of 4, as reflected on page 6 of the Presentence Report. [Doc. 44 at 6]. The applicable guideline provisions for a level of 4 is 0 to 6 months, [Doc. 44 at 9], not requiring the sentencing court to order a sentence of confinement at all. Clearly establishing the lower end of the Guidelines to be supervised release with no confinement.

In the instant case, the Government breached the plea agreement due to the Government's refusal to follow the plea agreement and recommend the lower end of the Guidelines, Defendant-Appellant was given a six month confinement, the most severe sentence the

Court could impose, which constitutes plain error and clearly affects a substantial right of Defendant-Appellant.

Defendant-Appellant contends that Fifth Circuit's reliance on *United States v. Cerverizzo*, 74 F.3d 629 (5th Cir. 1996) and *United States v. Alvarado-Saldivar*, 62 F.3d 697 (5th Cir. 1995), is misplaced and creates a substantial question to be resolved by the Supreme Court.

In *Cerverizzo*, "The government's breach of a plea agreement can constitute plain error." Further, the Court "should correct a plain forfeited error affecting substantial rights if the error 'seriously affect(s) the fairness, integrity or public reputation of judicial proceedings' ". *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), *cert. denied*, — U.S. —, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995).

Still further, the facts of the *Cerverizzo* case are easily distinguished from the case at bar in that in *Cerverizzo* the sentencing court was bound by a statutorily mandated minimum sentence. Therefore, failure of the government to recommend the lower 25% of the guideline, and therefore not comply with the plea agreement, did not affect a substantial right of Cerverizzo, thus the error was not plain error. However, the case at bar does not have a statutorily mandated minimum, the lower end of the guideline was clearly probation and Defendant-Appellant received incarceration, obviously affecting a substantial right of Defendant-Appellant.

Additionally, the Court Of Appeals has erroneously shifted the burden of establishing whether Defendant-Appellant complied with the plea agreement on Defendant-Appellant, when the agreement itself clearly states at paragraph 17, of the plea agreement: "Whether the defendant has breached any provision of this plea agreement, if contested by the parties, shall be determined by the Court in an appropriate proceeding during which the defendant's disclosures and documentary evidence shall be admissible *and during which the United States shall be required to establish a breach of the plea agreement by a preponderance of the evidence.*" (Emphasis added). If the Government intended not to honor the plea agreement, it was up to the Government to allege and prove at the district court that Defendant-Appellant breached the plea

agreement, however, this was raised for the first time by the Government during the appeal process.

Defendant-Appellant contends this issue is clearly established by the record in this case, both in the plea agreement itself and the transcript of the proceedings, and the responsibility to raise the issue creates a substantial question to be determined by the Supreme Court. *United States v. Hernandez*, 17 F.3d 78 (5th Cir. 1994).

Once again, if a plea agreement exists, and a plea of guilty has been in some way induced by a promise, it is essential to the fairness of the proceeding that the promise be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971).

CONCLUSION

The petition for a writ of certiorari should be granted.

ANTONIO MEDINA
DEFENDANT-APPELLANT

BY: William T Cornelius
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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. *98-20948*
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO MEDINA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-98-CR-61-2

Before EMILIO M. GARZA, BENAVIDES, and PARKER, Circuit Judges, PER CURIAM:*

Antonia Medina appeals from his conviction by guilty plea of illegal importation of Freon. Medina contends that the Government breached his plea agreement by failing to recommend sentencing at the low end of the guideline range.

Medina did not raise his contention in the district court; his contention is reviewed for plain error. *United States v. Cerverizzo*, 74 F.3d 629, 631 (5th Cir. 1996). Whether Medina provided the cooperation necessary to obtain the Government's recommendation is a factual issue that could have been resolved by the district court upon proper objection; Medina therefore cannot demonstrate plain error. *United States v. Alvarado-Saldivar*, 62 F.3d 697, 700 (5th Cir. 1995).

AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

United States District Court

Southern District of Texas

Holding Session in Houston

UNITED STATES OF AMERICA

v.

ANTONIO G. MEDINA

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 4:98CR00061-002

Chester Rene Gonzales

Defendant's Attorney

☐ See Additional Aliases – Sheet

THE DEFENDANT:

☒ pleaded guilty to count(s) 4 on July 13, 1998

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
42 U.S.C. § 7413(c)(1) and 7671c	Unlawful importation of Class I controlled substance, aiding and abetting, in violation of Stratospheric Ozone Protection [40 CFR §82.4(b)]	06/09/1995	4

☐ See Additional Counts of Conviction – Sheet

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____.

☒ Count(s) All remaining _____ are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Social Security No.: 636-09-0433

Defendant's Date of Birth: 10/03/1951

Defendant's USM No.: 77876-079

Defendant's Residence Address:

1895 West San Marcelo

Brownsville TX 78521

Defendant's Mailing Address:

1895 West San Marcelo

Brownsville TX 78521

/s/

October 5, 1998

Date of Imposition of Judgment

/s/ David Hittner

Signature of Judicial Officer

DAVID HITTNER

UNITED STATES DISTRICT JUDGE 55DH

Name and Title of Judicial Officer

Oct 9, 1998

Date

DEFENDANT: ANTONIO G. MEDINA Judgment – Page 2 of 6
CASE NUMBER: 4:98CR00061-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 6 month(s).

The term consists of SIX (6) MONTHS as to Count 4.

☐ See Additional Imprisonment Terms – Sheet
☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.
☒ The defendant shall surrender to the United States Marshal for this district:
  ☐ _____ on _____
  ☒ as notified by the United States Marshal.
☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  ☐ by 2 p.m. on _____
  ☐ as notified by the United States Marshal.
  ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: ANTONIO G. MEDINA Judgment – Page 3 of 6
CASE NUMBER: 4:98CR00061-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 year(s).

The term consists of TWO (2) YEARS as to Count 4.

☐ See Additional Supervised Release Terms – Sheet

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. §921. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

☒ See Special Conditions of Supervision – Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;
14) if restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U.S.C. §2248, 2259, 2264, 2327, 3663, 3663A, and/or 3664. The defendant shall also pay the assessment imposed in accordance with the Title 18 U.S.C. §3013;
15) the defendant shall notify the U.S. Probation Office of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

DEFENDANT: ANTONIO G. MEDINA
CASE NUMBER: 4:98CR00061-002

SPECIAL CONDITIONS OF SUPERVISION

If deported, the defendant is not to re-enter the United States illegally. If the defendant is deported during the period of probation or the supervised release term, supervision by the probation office becomes inactive. If the defendant returns, the defendant shall report to the nearest U.S. Probation Office immediately. Supervision by the probation office reactivates automatically upon the defendant reporting.

The defendant is required to perform 100 hours of community service as approved by the probation officer to be completed during the first six months of the supervised release term.

DEFENDANT: ANTONIO G. MEDINA Judgment – Page 4 of 6
CASE NUMBER: 4:98CR00061-002

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$50.00	$5,000.00	
☐ If applicable, restitution amount ordered pursuant to plea agreement			_____

☐ See Additional Terms for Criminal Monetary Penalties – Sheet

FINE

☐ The above fine includes costs of incarceration and/or supervision in the amount of $0.00

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$0.00	$0.00	

☐ See Additional Victims

** Findings for the total amount of losses are required under Chapter's 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ANTONIO G. MEDINA Judgment – Page 5 of 6
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SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment: (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of total fine and other criminal monetary penalties shall be due as follows:

A ☐ in full immediately; or

B ☒ $5,050.00 immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ in installments to commence ____ day(s)
In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ (e.g. equal, weekly, monthly, quarterly) installments of _____ over a period of ____ years(s) to commence ____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208.

☐ Joint and Several

Case Number (Including Defendant No.)	Defendant Name	Joint and Several Amount

☐ The defendant shall pay the cost of prosecution.

☐ See additional Joint & Several Defendants

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfet the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property - Sheet

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

DEFENDANT: ANTONIO G. MEDINA Judgment – Page 6 of 6
CASE NUMBER: 4:98CR00061-002

STATEMENT OF REASONS

☒ The Court adopts the factual findings and guideline application in the present report.

OR

☐ The Court adopts the factual findings and guideline application in the presentence report except:

☐ See Additional Findings and Guideline Application Exceptions - Sheet

Guideline Range Determined by the Court:

Total Offense Level: 4
Criminal History Category: 1
Imprisonment Range: 0 to 6 months.
Supervised Release Range: 2 to 3 years.
Fine Range: $250.00 to $5,000.00

☐ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. §3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

☐ Partial or no restitution is ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

☐ See Additional Reasons for Point Within Range - Sheet

OR

☐ The Sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

☐ See Additional Reasons For Departure From The Guideline Range - Sheet

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	CR NO. H-98-61
	)	Houston, Texas
vs.	)	
ERNESTO MEDINA, ANTONIO MEDINA, MEDINA FORWARDING CORPORATION	)	July 13, 1998
	)	9:30 a.m.

REARRAIGNMENT PROCEEDINGS
BEFORE THE HONORABLE DAVID HITTNER

A P P E A R A N C E S:

FOR THE UNITED STATES: Mr. Gordon Speights Young
Assistant U.S. Attorney
910 Travis, Suite 1500
Houston, Texas 77002

FOR THE DEFENDANT ERNESTO MEDINA
Mr. Luis Saenz
117 East Price Road
Brownsville, Texas 78521

FOR THE DEFENDANT ANTONIO MEDINA AND MEDINA FORWARDING:
Mr. Chester R. Gonzales
117 East Price Road
Brownsville, Texas 78521

OFFICIAL COURT REPORTER: Joyce K. Schaefer
515 Rusk, Suite 8102
Houston, TX. 77002

OFFICIAL COURT INTERPRETER PRESENT

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,
PRODUCED BY COMPUTER-AIDED TRANSCRIPTION
JOYCE K. SCHAEFER - (713) 250-5595

MR. YOUNG: Yes, Your Honor, they have been.

THE COURT: All right, As you are not citizens of the United States, do you understand that a felony conviction may lead to your deportation or exclusion from this country?

MR. ERNESTO MEDINA: Yes, Your Honor.

MR. ANTONIO MEDINA: Yes, Your Honor.

THE COURT: Has any plea agreement been entered into between the parties?

MR. YOUNG: Yes, Your Honor.

THE COURT: What is it, first? All I want to know now is what does the plea agreement provide for the defendants' rights to appeal?

MR. YOUNG: Waiving their rights to appeal, Your Honor.

THE COURT: On all grounds?

MR. YOUNG: Yes, Your Honor.

THE COURT: All right, Under what section are we proceeding? 11(e)(1) what?

MR. YOUNG: (B).

THE COURT: (B). All right. Under the Sentencing Reform Act, the United States Sentencing Commission has issued guidelines for judges to follow in determining the sentence in a criminal case. Have you and your attorney talked about how these guidelines might apply to your case?

MR. ERNESTO MEDINA: Yes, Your Honor.

MR. ANTONIO MEDINA: Yes, Your Honor.

THE COURT: Do you understand that the Court will not be able to determine the guideline sentence in your case until after a presentence report has been completed and you and your attorney have had an opportunity to challenge the facts reported by the Probation Officer?

MR. ERNESTO MEDINA: Yes, Your Honor.

MR. ANTONIO MEDINA: Yes, Your Honor.

THE COURT: Do you also understand that, after it has been determined what guideline applies in a case, I have the authority in some circumstances to impose a sentence that is more severe or less severe that the sentence called for by the guidelines?

MR. ERNESTO MEDINA: Yes, Your Honor.

MR. ANTONIO MEDINA: Yes, Your Honor.

THE COURT: Do you also understand that under some circumstances, ordinarily you or the government may have the right to appeal any sentence that a Court imposes, except in this case each of you individually and corporately have waived the right to appeal? Do you understand that?

MR. ERNESTO MEDINA: Yes, Your Honor.

MR. ANTONIO MEDINA: Yes, Your Honor.

THE COURT: All right. Do you understand that parole has been abolished in the federal system and, if you are sentenced to federal prison, you will not be released on parole?

MR. ERNESTO MEDINA: Yes, Your Honor.

MR. ANTONIO MEDINA: Yes, Your Honor.

THE COURT: All right. Please state for the record, then, the terms of the full plea agreement.

MR. YOUNG: Your Honor, the United States has agreed that, if the defendants cooperate fully in further investigation, the United States will dismiss counts 1, 2 and 3 and recommend an appropriate sentence at the lower end of the guidelines. The defendants have agreed, in addition to waiving their rights to apeal and to plead guilty to count 4, to waive any right that they may have acquired under the Hyde Amendment.

THE COURT: Okay. Are these the terms of the plea agreement with the government as you understand them?

MR. ERNESTO MEDINA: Yes, Your Honor.

MR. ANTONIO MEDINA: Yes, Your Honor.

THE COURT: Has anyone made any other or different promise to you of any kind such as possible leniency or an offer of probation in order to get you to plead guilty in this case?

MR. ERNESTO MEDINA: No, Your Honor.

MR. ANTONIO MEDINA: No, Your Honor.

THE COURT: All right. The Court is considering your plea agreement under Federal Rule of Criminal Procedure 11(e)(1)(B). Do you understand that I may accept or reject the plea agreement as proposed to the Court?

MR. ERNESTO MEDINA: Yes, Your Honor.

MR. ANTONIO MEDINA: Yes, Your Honor.

THE COURT: Do you also understand that if I accept your plea of guilty today but reject the plea agreement that the parties have brought before the Court, you will, none the less, not be permitted to withdraw your plea of guilty?

Also, do you understand that the government's recommendation or your request for a particular sentence is not binding on me and I am free to assess any punishment within the limits prescribed by law as I described them earlier?

MR. ERNESTO MEDINA: Yes, Your Honor.

MR. ANTONIO MEDINA: Yes, Your Honor.

THE COURT: All right. Very well. Are you now ready to enter a plea to count 4 of the charges pending against you?

MR. ERNESTO MEDINA: Yes, Your Honor.

MR. ANTONIO MEDINA: Yes, Your Honor.

THE COURT: All right. Let me ask each of the counsel: Do you know any reason why your client should not plead guilty?

MR. SAENZ: No, Your Honor.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	CRIMINAL NO. H-98-61-02
	)	
ANTONIO MEDINA	)	

PLEA AGREEMENT

COMES NOW the United States of America, by and through its attorneys James DeAtley, United States Attorney for the Southern District of Texas and GORDON SPEIGHTS YOUNG, Assistant United States Attorney, and the defendant, ANTONIO MEDINA, and the defendant's counsel, pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure, and state that they have entered into an agreement, the terms and conditions of which are as follows:

1. The defendant, ANTONIO MEDINA, agrees to plead guilty to Count Four of the indictment in this case. Count Four charges the defendant with a violation of a requirement relating to Stratospheric Ozone Protection under the Clean Air Act, in violation of 42 USC §7413(c)(1), 7671c; 18 USC §2; 40 CFR §82.4(b).

The defendant further agrees to cooperate fully with the United States and to provide all information relating to any criminal activity know to the defendant, including but not limited to the offenses charged in this case. The defendant understands that such information may be provided to any state, local or federal law enforcement agency. In that regard:

a. The defendant agrees to testify as a witness before any grand jury as may be requested by the United States, and at any other judicial proceedings when called upon to do so.

b. The defendant agrees to be reasonably available for interviews and conferences as the United States may request.

c. The defendant agrees to provide truthful, complete and accurate information and testimony.

d. The defendant agrees to provide all documents, records, writings or tangible objects or materials of any kind in the defendant's possession or under his custody or control relating directly or indirectly to all areas of inquiry and investigation.

2. As part of this agreement, the United States agrees to dismiss Counts One, Two, and Three at time of sentencing. The United States further agrees that if the defendant fully cooperates in providing all information relating to criminal activity known to him, as set out above, that the United States will recommend a sentence at the lower end of the Guidelines. The United States further stipulates that the defendant was not an organizer, leader, manager, or supervisor in the criminal activity, and that the relevant conduct of the defendant did not involve the failure to pay any Customs tax, that it did not involve any required permit, and that there was no release of the pollutant.

3. The penalty for each violation of Title 42, United States Code, Sections 7413(c)(1) and 7671c, is a maximum term of imprisonment of 5 years, and a fine of $250,000; and a possible period of supervised release not to exceed three years. The defendant also acknowledges and understands that if he should violate the conditions of any period of supervised release which may be imposed as part of his sentence, then the Defendant may be

imprisoned for the entire term of supervised release without credit for time already served on the term of supervised release prior to such violation. The defendant cannot be placed on probation or have the imposition or execution of the sentence suspended. Further, the defendant is not eligible for parole.

4. Prior to or at the time of sentencing, the defendant will pay to the United States Department of Justice a special assessment in the amount of one hundred dollars ($100.00) per count of conviction, as required in Title 18, United States Code, Section 3013(a)(2)(A). The payment will be by certified check payable to Department of Justice, c/o U.S. Attorney's Office. P.O. Box 61129, Houston, Texas 77208.

5. The defendant understands that the Court is permitted, pursuant to Section 5E1.2(i) of the Sentencing Guidelines and Policy Statements, to order the defendant to pay a fine that is sufficient to reimburse the government for the costs of any imprisonment, term of supervised release and probation, if any are ordered.

6. The defendant agrees that any fine or restitution imposed by the Court will be due and payable immediately.

7. The defendant agrees to file a sworn financial affidavit that any fine or restitution imposed by the Court will be due and payable immediately. The defendant also agrees not to attempt to avoid paying any fine or restitution imposed by the Court through any proceeding pursuant to the United States Bankruptcy Code. The defendant hereby waives all rights, if any, to obtain discharge or to delay payment of any fine or restitution obligation or alter the

time for payment by filing a petition pursuant to the Bankruptcy Code. The defendant hereby stipulates that enforcement of any fine or restitution obligation by the United States or a victim is not barred or affected by the automatic stay provisions of the United States Bankruptcy Code (Title 11, United States Code, Section 362), and that enforcement of any fine or restitution obligation by the United States is a valid exercise of its police or regulatory power within the meaning of Title 11, United States Code, Section 362(b). The defendant hereby stipulates and agrees not to institute or participate in any proceeding to interfere with, alter, or bar enforcement of any fine or restitution obligation pursuant to the automatic stay or other provision of the Bankruptcy Code in any case filed by the defendant or the defendant's creditors. Upon request of the United States or the victim, the defendant will execute an order or stipulation granting the United States or the victim relief from the automatic stay or other Bankruptcy Code provisions in order to enforce any fine or restitution obligation. The defendant hereby stipulates that any fine or restitution obligation imposed by the Court is not dischargeable in any case commenced by the defendant or the defendant's creditors pursuant to the Bankruptcy Code. The defendant's waivers and stipulations or agreements set forth above are made in exchange for the United States' concessions set forth in this plea agreement.

8. The defendant understands that the sentence to be imposed is within the discretion of the sentencing judge. If the Court should impose any sentence up to the maximum established by statute, the defendant cannot, for that reason alone, withdraw a

guilty plea and will remain bound to fulfill all of the obligations under this plea agreement.

9. The defendant is aware that the defendant's sentence will be imposed in accordance with the Sentencing Guidelines and policy Statements. The defendant nonetheless acknowledges and agrees that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for the offense(s) to which the defendant pleads guilty. The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Knowing that, the defendant waives the right to appeal the sentence (or the manner in which it was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatever. This agreement does not affect the rights or obligations of the United States as set forth in Title 18, United States Code, Section 3742(b).

10. In agreeing to this waiver, the defendant is aware that a sentence has not yet been determined by the Court. The defendant is also aware that any estimate or the probable sentencing range under the sentencing guidelines that the defendant may have received from the defendant's counsel, the United States or the Probation Office, is a prediction, not a promise, and is not binding on the United States, the Probation Office or the Court. The United States does not make any promise or representation concerning what sentence the defendant will receive. Realizing the uncertainty in estimating what sentence the defendant will ultimately receive, the defendant knowingly waives the right to appeal the sentence in exchange for the concessions made by the United States in this plea agreement.

11. The United States reserves the right to carry out its responsibilities under guidelines sentencing. Specifically, the United States reserves the right: (a) to bring its version of the facts of this case including its file and any investigative files to the attention of the Probation Office in connection with that office's preparation of a presentence report; (b) to dispute sentencing factors or facts material to sentencing; (c) to seek resolution of such factors or facts in conference with defendant's counsel and the Probation Office and (d) to file a pleading relating to these issues, in accordance with Section 6A1.2 of the Sentencing Guidelines and Policy Statements.

12. The United States agrees that it will not further criminally prosecute defendant in the Southern District of Texas for offenses arising from conduct charged in the indictment. This plea agreement binds only the United States Attorney's Office for the Southern District of Texas and the defendant; it does not bind any other United States Attorney. The United States will bring this plea agreement and the full extent of the defendant's cooperation to the attention of other prosecuting offices if requested.

13. The defendant agrees that the position of the United States in its decision to charge him, or to pursue any charge against him, is neither vexatious, frivolous, nor in bad faith. In accord with this agreement, the defendant waives all rights he has or may acquire under the "Hyde Amendment" to the Department of Justice's Appropriation Bill (H.R. 2267) for fiscal year 1998,

including any implementing regulation or rule (collectively referred to as the "Hyde Amendment"), to recovery of attorney's fees, and other litigation expenses related to any investigation or prosecution of the counts in the Indictment, and to any transactions or conduct related to, arising from, or associated with those counts. The defendant agrees that he will not file any motion, request, or other cause of action, nor will he request, authorize, or allow any other person to file or make any such motion, request, or other cause of action on his behalf.

14. The defendant represents to the Court that defendant is satisfied that his attorney has rendered effective assistance. Defendant understands that by entering into this Agreement, he surrenders certain rights as provided in this Agreement. Defendant understands that the rights of defendants include the following:

a. If the defendant persisted in a plea of not guilty to the charges, defendant would have the right to a speedy jury trial with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if the defendant, the United States and the court all agree.

b. At a trial, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those witnesses and his attorney would be able to cross-examine them. In turn, the defendant could, but would not be required to, present witnesses and other evidence of his own behalf. If the witnesses for the defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court.

e. At a trial, the defendant could rely on a privilege against self-incrimination and decline to testify, and no inference of guilt could be drawn from such refusal to testify. However, if the defendant desired to do so, he could testify on his own behalf.

15. The defendant understands that nothing in this plea agreement, however, will restrict access by the Probation Office or the Court to information and records in the possession of the United States, including that obtained from the defendant.

16. If the defendant should fail in any way to fulfill completely all of the obligations under this plea agreement, the United States will be released from its obligations under the plea agreement. Thus, for example, if at any time the defendant retains, conceals or disposes of assets in violation of this plea agreement; or if the defendant knowingly withholds evidence, or otherwise is not completely truthful with the United States, an officer of the United States, any law enforcement officer, or in testimony before the grand jury or at trial; or if the defendant knowingly gives false information to the United States relating to another's participation in criminal activity, then:

a. The defendant may be prosecuted for perjury, false declaration, false statement, and/or obstruction of justice or any other offenses that may have been committed;

b. Any information and documents that have been disclosed by the defendant, whether prior to or subsequent to this plea agreement, and all leads derived therefrom will be used against the defendant in any prosecution;

c. The United States will be permitted to recommend to

the Court any sentence it considers appropriate, up to and including the maximum possible sentence.

17. Whether the defendant has breached any provision of this plea agreement, if contested by the parties, shall be determined by the Court in an appropriate proceeding during which the defendant's disclosures and documentary evidence shall be admissible and during which the United States shall be required to establish a breach of the plea agreement by a preponderance of the evidence. The provisions of this paragraph do not apply, however, to the United States' decision whether to file a motion based on "substantial assistance" as the phrase is used in Rule 35(b) of the Federal Rules of Criminal Procedure and Section 5K1.1 of the Sentencing Guidelines and Policy Statements. The defendant agrees that the decision whether to file such a motion rests within the sole discretion of the United States.

18. The defendant agrees as part of this plea agreement to join in any motion brought by the United States under Rule 6(e)(3)(c) of the Federal Rules of Criminal Procedure, to disclose grand jury material to the Internal Revenue Service for use is computing and collecting the defendant's taxes, interest and penalties, and to the civil and forfeiture sections of the United States Attorney's Office for use in identifying assets and collecting fines and restitution.

19. The defendant also understands that he must file tax returns and pay taxes on any income derived directly or indirectly from the offenses charged in the indictment/ information.

20. The defendant also agrees to make all books, records and

documents available to the Internal Revenue Service for use in computing defendant's taxes, interest and penalties for the years 1995.

21. This written agreement constitutes the complete plea agreement between the United States, the defendant, and the defendant's counsel. No promises or representations have been made by the United States except as set forth in writing in this plea agreement. The defendant acknowledges that no threats have been made against the defendant and that the defendant is pleading guilty freely and voluntarily because the defendant is guilty. Any modification of this plea agreement shall be valid only as set forth in writing in a supplemental or revised plea agreement signed by all parties.

/s/ Antonio Medina
ANTONIO MEDINA
Defendant

SUBSCRIBED AND SWORN TO BEFORE ME On this 13th day of July, 1998.

Michael N. Milby, Clerk

By: /s/
Deputy Clerk

APPROVED:

/s/ Gordon M. Speights Young

GORDON M. SPEIGHTS YOUNG
Assistant United States Attorney

/s/ Chester Gonzalez

CHESTER GONZALEZ
Counsel for Defendant

/s/ Antonio Medina

ANTONIO MEDINA
Defendant

I have consulted with my counsel and fully understand all my rights with respect to the Indictment pending against me. Further, I have consulted with my attorney and fully understand my rights with respect to the provisions of the Sentencing Guidelines and Policy Statements which may apply in my case. I have read this plea agreement and carefully reviewed every part of it with my attorney. I understand this agreement and I voluntarily agree to it.

Date: 7/13/98

/s/ Antonio Medina
ANTONIO MEDINA
Defendant

I have fully explained to the defendant, his rights with respect to the pending indictment. Further, I have reviewed the provisions of the Sentencing Guidelines and Policy Statements and I have fully explained to the defendant the provisions of those Guidelines which may apply in this case. I have carefully reviewed every part of this plea agreement with the defendant. To my knowledge, the defendant's decision to enter into this agreement is an informed and voluntary one.

Date: 7/13/98

/s/ Chester Gonzalez
CHESTER GONZALEZ
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	)	
	)	**PRESENTENCE**
vs.	)	**INVESTIGATION REPORT**
	)	**Docket No. 4:98CR00061-002**
ANTONIO G. MEDINA	)	

Prepared For: The Honorable David Hittner
United States District Judge

Prepared By: Erma B. Navarro
United States Probation Officer
Houston, Texas
(713) 250-5292

Lisa Reed
Sr. United States Probation Officer
Lead Writer

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Defense Counsel
Chester Rene Gonzales
117 E. Price Road
Brownsville, Texas 78521
(956) 550-9550

Sentence Date: October 5, 1998, at 9:30 a.m.

Offense: *Count 4:* Clean Air Act, violation of requirement and rule relating to stratospheric ozone protection by unlawfully importing into the United States a Class I controlled substance, aiding and abetting, in violation of 42 U.S.C. § 7413(c)(1) and 7671c; 18 U.S.C. § 2; and 40 CFR § 82.4(b).

Up to 5 years imprisonment, $250,000 fine, up to 3 years supervised release, and $50 special assessment. (Class D Felony).

Release Status: Arrested on February 24, 1998, and was released on a $100,000 property surety bond.

Detainers: None.

Codefendants:

Ernesto Medina	4:98CR00061-001
Medina Forwarding Corporation	4:98CR00061-003

Date Report Prepared: September 4, 1998 **Date Report Revised:**

Related Cases: None.

Identifying Data:

Date of Birth:	October 3, 1951
Age:	46
Race:	White/Hispanic
Sex:	Male
SSN No:	636-09-0433
FBI No:	234037HB1
USM No:	77876-079
Other ID No:	
Education:	College Graduate/CPA
Dependents:	2
Citizenship:	Mexico
Legal Address:	1895 West San Marcelo Brownsville, Texas 78521
Aliases:	Antonio Gerardo Medina Flores Antonio G. Flores Tono

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On February 23, 1998, a four count indictment was filed in the United States District Court for the Southern District of Texas, Houston Division, charging two individual defendants and a corporation with conspiracy to violate the laws of the United States, receiving and transporting smuggled merchandise, entry of goods into the United States by means of false statements, and violation of the Clean Air Act requirements and rules relating to stratospheric ozone protection by unlawfully importing a Class I controlled substance. Ernesto Medina, **Antonio Medina,** and Medina Forwarding Corporation are charged in each of the four counts.
2. **Antonio Medina** was arrested in Brownsville, Texas, on February 24, 1998. He made his initial appearance before United States Magistrate Judge Fidencio Garza, Jr., and bond was set in the amount of $100,000 cash surety. The bond was filed the following day.
3. On July 13, 1998, **Antonio Medina** appeared with counsel before United States District Judge David Hittner and entered a plea of guilty to Count 4. This plea was entered pursuant to a Rule 11(e)(1)(B) Plea Agreement, wherein the Government agrees to dismiss the remaining counts at the time of sentencing. The defendant agrees to cooperate fully with the Government. The Government agrees to recommend a sentence at the lower end of the Guidelines and stipulates that the defendant was not an organizer, leader, manager, or supervisor in the criminal activity. The Government also stipulates that the relevant conduct of the defendant did not involve the failure to pay any Customs tax, that it did not involve any required permit, and that there was no release of the pollutant. The defendant knowingly waives the right to appeal the sentence or the manner in which it is determined. A presentence report was ordered and sentencing is scheduled for October 5, 1998, at 9:30 a.m.

The Offense Conduct

4. Information for this section of the report was obtained through review of the investigative files of the United States Attorney's Office, United States Customs Service (USCS), United States Environmental Protection Agency (EPA), and through interviews with USCS special agent Edward Tarver.

5. This offense involves receiving, transporting and mishandling smuggled merchandise. To better illustrate the facts of the case, the following background information is provided. An international treaty (the Montreal Protocol) outlawed the production of dichlorodifluoromethane, also referred to as R-12, CFC-12, and Freon (brand name); and production was to be phased out over a period of years. Certain countries were given a longer time to cease production. Mexico and Russia are among those countries and are still producing R-12, although production for internal consumption has ceased in the United States and Western Europe. In the United States, the Clean Air Act was amended to prohibit the importation of R-12 into the United States without an allowance from the EPA during the phase-out period. All production and importation was to cease by January 6, 1996. After the phase-out period, a small quantity has been allowed to be imported under essential use permits for use in inhalants. In-bond shipments (held in the United States under a bonding company) of R-12 for immediate export to other countries were not prohibited during the phase-out period.

6. On April 28, 1995, 1,200 - 30 lb. pressure cylinders containing R-12 were shipped from St. Petersburg, Russia, to a Mexican automobile parts distributor. On the shipping documents accompanying the cargo from Russia, Madison Metals located in Bayshore, New York was listed as the party to be notified concerning the cargo. The owner of Madison Metals is Joseph Yariv, a Russian national. The cylinders were to travel through Houston in-bond on an immediate transport status for immediate export to Mexico. While the cargo was in transit, Madison Metals notified the shipper that the consignee was to

be changed from the original Mexican parts distributor to a company in Mexico City named Comertex, and that the new party to be notified concerning the shipment was Medina Forwarding, Corp., Brownsville, Texas.

7. The containers of R-12 were sent by truck on May 24, from Houston to Sam Martinez Company's shipping yard in Brownsville, and from there were picked up by Medina Forwarding, Corp. on June 1, 1995. Customs from 7512 shows entry of the 1,200 cylinders at Brownsville on May 31, 1995, and listed the immediate export number of the Sam Martinez Company, meaning that the goods were covered by the Sam Martinez Company's bond.

8. A few days after the arrival of the R-12 at Brownsville, Sam Martinez, owner of the Sam Martinez Company, met with Ernesto Medina and **Antonio Medina** and informed them that he did not want to continue handling the bond on this shipment. On June 3, 1995, David Ruiz replaced the bond in the name of his company, removing Martinez's bond from the Customs form.

9. On June 6, 1995, Alex Roitman, an employee of Madison Metals, checked into a hotel in Brownsville. During his visit, he met with the Ernesto and **Antonio Medina**. Two days after his departure, the 1,200 cylinders were shipped in two Yellow Freight trucks from Medina Forwarding to Skillman Auto Body, Long Island City, New York. At Skillman, the cylinders were loaded onto a rental truck. The rental papers for the truck listed the driver as Alex Roitman. At that same time, Ernesto Medina deposited $8,000 into his bank account in the form of one $2,400 money order from a bank in New York and eight $700 postal money orders from a Long Island City post office. The Clean Air Act and Customs law prohibit the importation of R-12 into the United States without an essential use permit from the EPA. Also, Mexican law does not allow the importation of R-12 into Mexico.

10. Approximately two weeks before the R-12 cylinders were transported to Long Island City, New York, a freight forwarder

had prepared a bill of lading from AAA Guarantee to Medina Forwarding for 1,170 empty Freon cylinders. During this same time frame, Worthington Cylinders received a wire transfer from Madison Metals for the purchase of empty pressure York, confidential informants (CIs) notified USCS agents that Medina Forwarding had a large number of cylinders that represented to have Freon, and that they were in fact empty. The empty cylinders were to be exported into Mexico to clear the Customs paperwork, as had been represented on the original shipping documents.

11. USCS agents established surveillance on Medina Forwarding. On July 25, 1995, agents witnessed a tractor-trailer being loaded with the cylinders. On July 26, 1995, it left the warehouse and was driven to one of the Brownsville Port of Entry bridges. USCS inspectors stopped the truck as it attempted to leave the United States. The cargo manifest declared a shipment of 1,200 pieces of dichloromethane (a solvent) in bond from Russia to Mexico. (It is noted that the false manifest did not comport to the original bill of lading which listed the cargo as dichlorodifluoromethane). Inspectors found 1,170 empty canisters marked as Freon. There was paperwork on the truck showing that the cylinders were purchased from AAA Cylinders in mid-June. The driver told inspectors that at least two Medina employees checked the cylinders to ensure that they were empty.

12. On July 26, 1995, the day the cylinders were transported from the warehouse, Ernesto Medina and Jaime Alcove flew to Houston and then to Chicago, where they met with Joseph Yariv at Chicago O'Hare Airport on July 27, 1995.

13. On July 27, 1995, USCS agents executed a search warrant at Medina Forwarding Corp., at which time agents seized documents concerning the shipment of the full containers on Yellow Freight Systems trucks. During the search, agents also found a facsimile regarding the meeting between Medina and Yariv in Chicago.

Victim Impact

14. There are no identifiable victims of the offense.

Adjustment for Obstruction of Justice

15. The probation officer has no information to suggest that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

16. The defendant provided a written statement which reads, in part, "Sometime during the month of May 1995, my brother Ernesto Medina and I were contacted at Medina Forwarding by Joseph Yariv and Alex Roitman. They asked us if we could export into Mexico cylinders of dicholorodifluormethane (commercially known as freon). We could not accomplish this because freon is a banned product in Mexico. Yariv and Roitman then devised a plan to divert the shipment of 1200 cylinders of freon from its bond status in the warehouse of Medina Forwarding Corp. We then met with David Ruiz of R.C. David Co., a licensed freight forwarder, to prepare paperwork and to use its bond to ship empty freon cylinders to Mexico and replace the full cylinders that had been imported in bond into the United States but returned to Long Island, New York. We then loaded approximately 1170 empty cylinders warehouse of Medina Forwarding Corp. We then met with David Ruiz of R.C. David Co., a licensed freight forwarder, to prepare paperwork and to use its bond to ship empty freon cylinders to Mexico and replace the full cylinders that had been imported in bond into the United States but returned to Long Island, New York. We then loaded approximately 1170 empty cylinders from the Medina Forwarding Corporation warehouse onto a trailer. However, the empty cylinders never crossed into Mexico because they were apprehended by United States Customs. What I did was wrong, against the law and I am truly remorseful for my conduct."

Offense Level Computations

17. The 1997 edition of the *Guidelines Manual* has been used in this case.

Count 4—Violation of Clean Air Act

		6
18.	**Base Offense Level:** The United States Sentencing Commission Guideline for violation of 42 U.S.C. § 7413(c)(1) is found in U.S.S.G. § 2Q1.3 and calls for a base offense level of 6.	
19.	**Specific Offense Characteristic:** None.	0
20.	**Victim-Related Adjustments:** None.	0
21.	**Adjustments for Role in the Offense:** None.	0
22.	**Adjustment for Obstruction of Justice:** None.	0
23.	**Adjusted Offense Level (Subtotal):**	6
24.	**Adjustment for Acceptance of Responsibility:** Pursuant to U.S.S.G. § 3E1.1(a), the offense is reduced two levels, as the defendant admitted to the conduct comprising the offense of conviction.	−2
25.	**Total Offense Level:**	4
26.	**Chapter Four Enhancements:** None.	0
27.	**Total Offense Level:**	4

PART B. DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s)

28. None.

Adult Criminal Conviction(s)

29. None.

Criminal History Computation

30. The criminal convictions above result in a subtotal criminal history score of zero. The total of the criminal history points is zero. According to the sentencing table at U.S.S.G. § Chapter 5, Part A, zero criminal history points establish a criminal history category of I.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

31. Antonio G. Medina was born on October 3, 1951, in Mexico City, Mexico. He is one of three children born to Antonio Medina Sr., age 73 and to Carmen Flores Medina, age 65. Both his parents live in Brownsville, Texas. The defendant's siblings are Ernesto Medina, age 45, who is a co-defendant in this case; and Maria De La Luz Medina, age 35, who is a housewife in San Antonio, Texas. The defendant reported a close and loving relationship with his parents and siblings. The defendant came to the United States in 1995, under a work visa. Since his stay in the United States, he has lived in Brownsville, Texas, where he continues to reside.

32. In 1976, the defendant married Carmen Zapien; however, the marriage ended in divorce in 1981. From this union, they have a son identified as Antonio Medina Zapien, who resides in Mexico. On November 22, 1988, the defendant married Juliana Medrino and the marriage remains intact. From this union, they have two children, Marta Juliana Medina, age 8; and Jovana Medina, age 6. Both children reside with the defendant and his wife in Brownsville, Texas.

Physical Condition

33. The defendant is 5 feet 10 inches tall, weighs approximately 160 pounds, has black hair and green eyes. He has no distinguishing marks, scars or tattoos. The defendant reported to be in good health and is not undergoing any type of treatment.

Mental and Emotional Health

34. The defendant reported to be in good mental health and denied having any history of psychological or emotionally problems.

Substance Abuse

35. Medina stated that he has never used illegal drugs and does not consume alcohol or tobacco items.

Education and Vocational Skills

36. The defendant completed his primary and secondary levels of education in Mexico City. From 1972 until 1976, he attended the College Politecnico De Mexico and earned a Bachelor of Arts degree in Accounting. Medina is also a certified accountant.

Employment Record

37. From 1986 until present, the defendant has been employed as the office manager for Medina Forwarding Corporation at 3549 14th Street, Brownsville, Texas. The corporation is owned and operated by the defendant's brother Ernesto, who is named as a codefendant in this case. The defendant's additional duties involved the supervision of personnel and the classification of goods shipped into Mexico.

Asset

38. The defendant submitted the following joint financial information:

Cash	
Checking Account(s)	2,000.00
Subtotal:	$ 2,000.00
Unencumbered Assets	
Household Furnishings	$30,000.00
Subtotal:	$30,000.00
Equity in Other Assets	
Real Estate	54,000.00
Subtotal:	$54,000.00
Total Assets:	$86,000.00
Unsecured Debts	
Credit Cards	51,000.00
Total Unsecured Debt:	$51,000.00
NET WORTH:	$35,000.00
Income	
Defendant's Net Salary	1,600.00
Commissions	3,000.00
Mexican Truck	400.00
Total Income:	$ 5,000.00
Necessary Monthly Living Expenses	
Property Mortgage(s)/Rent	1,000.00
Food	500.00
Utilities	300.00
Telephone	100.00
Credit Cards	96.00
Car Insurance	150.00
Health Insurance	250.00
School Tuition	500.00
Total Expenses:	$ 2,896.00
Net Monthly Cash Flow:	$ 2,104.00

39. The defendant indicated that in 1991, he purchased his home located 1895 West San Marcelo for $120,000. His current balance is approximately $66,000. He also has two vehicles, a 1996 Dodge Caravan with a loan balance of $19,509 and a 1994 Grand Marquis with a loan balance of $6,000. The defendant indicated monthly payments of $709 which brings his total expenses to $3,605 and his net monthly cash flow to $1,395.

PART D. SENTENCING OPTIONS

Custody

40. **Statutory Provisions:** The maximum term of imprisonment is 5 years, pursuant to 42 U.S.C. § 7413(c)(1).

41. **Guideline Provisions:** Pursuant to U.S.S.G. § Chapter 5, Part A, based on a total offense level of 4 and a criminal history category of I, the guideline range for imprisonment is 0 to 6 months.

Impact of the Plea Agreement

42. The Plea Agreement filed by the Government has no impact upon the prescribed guideline imprisonment range.

Supervised Release

43. **Statutory Provisions:** If a term of imprisonment is imposed, the court may impose a term of supervised release of not more than three years, pursuant to 18 U.S.C. § 3583(b)(2).

44. **Guideline Provisions:** The guideline range for a term of supervised release is at least two years but not more than three years, pursuant to U.S.S.G. § 5D1.2(a)(2). If a sentence of imprisonment of one year or less is imposed, a term of supervised release is not required but is optional, pursuant to U.S.S.G. § 5D1.1(b). Supervised release is required if the Court imposes a term of imprisonment of more than one year, pursuant to U.S.S.G. § 5D1.1(a).

Probation

45. **Statutory Provisions:** The defendant is eligible for not less than one nor more than five years probation by statute, pursuant to 18 U.S.C. § 3561(c)(1). Because the offense is a felony, one of the following must be imposed as a condition of probation unless extraordinary circumstances exist: a fine, restitution, or community service, pursuant to 18 U.S.C. § 3563(a)(2).

46. **Guideline Provisions:** The defendant is eligible for probation because the applicable guideline range is in Zone A of the Sentencing Table, pursuant to U.S.S.G. § 5B1.1(a)(1). If the court imposes probation, the term must be no more than three years because the offense level for the instant offense is 4, pursuant to U.S.S.G. § 5B1.2(a)(2).

Fines

47. **Statutory Provisions:** The maximum fine is $250,000, pursuant to 18 U.S.C. § 3571. A special assessment of $50 is mandatory, pursuant to 18 U.S.C. § 3013.

48. Pursuant to 18 U.S.C. § 3612(f)(1), a defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the 15th day after the date of judgment. If the Court determines that the defendant does not have the ability to pay interest, 18 U.S.C. § 3612(f)(3) authorizes the Court to waive the requirement for interest, limit the total interest payable to a specific dollar amount; or limit the length of the period during which interest accrues. If interest is not waived by the Court at the time of sentencing, the Attorney General may subsequently waive all or part of any interest that has accrued if, as determined by the Attorney General, reasonable efforts to collect the interest are not likely to be effective, pursuant to 18 U.S.C. § 3612(h).

49. **Guideline Provisions:** The fine range for the instant offense is from $250 to $5,000, pursuant to U.S.S.G. § 5E1.2(c)(3).

Restitution

50. **Statutory Provisions:** Restitution is not an issue.

51. **Guideline Provisions:** Restitution is not an issue.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

52. The probation officer has no information concerning the offense or the offender which would warrant a departure from the prescribed sentencing guidelines.

Respectfully submitted,
Louis G. Brewster
Chief U.S. Probation Officer

by /s/ Erma B. Navarro
Erma B. Navarro
United States Probation Officer

EBN:hs:jmj

Approved:

/s/ Becky Burks
Becky Burks, Supervising
United States Probation Officer

DATE: September 4, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No. H-98-61-02
	)	
VERSUS	)	Houston, Texas
	)	October 5, 1998
ANTONIO MEDINA	)	9:30 a.m.

SENTENCING
BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE

For the United States:	Mr. Gordon Speights Young Assistant United States Attorney P.O. Box 61228 Houston, Texas 77208
For the Defendant:	Mr. Chester Rene Gonzales Attorney at Law 117 E. Price Road Brownsville, Texas 78520
Court Reporter:	Fred Warner Official Court Reporter 515 Rusk Avenue Houston, Texas 77002

Proceedings recorded by mechanical stenography, produced by computer-aided transcription.

THE COURT: Court calls the case 98-61-02, United States versus Antonio Medina.

MR. GONZALES: Ready, Your Honor.

THE COURT: Who represents the government?

MR. YOUNG. Gordon Speights Young, Your Honor.

THE COURT: For the defense?

MR. GONZALES: Chester Gonzales, Your Honor.

THE COURT: I have read the presentence report. I don't see any objections, but aside from what you have in writing, any additions or corrections or objections by the government?

MR. YOUNG: No, Your Honor.

THE COURT: Any additions or corrections or objections by the defense?

MR. GONZALES: No, Your Honor.

THE COURT: Counsel, do you desire to make a statement on behalf of your client?

MR. GONZALES: Judge, my client is remorseful for his conduct; has never had any prior problems before, Judge. We would ask the Court to consider the recommendation lower end of the guidelines, Judge. He has cooperated with the authorities, Your Honor.

THE COURT: very well.

Does your client desire to make a statement on his own behalf?

THE DEFENDANT: Your Honor, before anything, I would like you to know this has been a terrible nightmare for us because this affected my parents, my wife, my marriage, my reputation and my brother's reputation and the company's reputation. We lost several customers. We are working people. We are trying by all means to recover our customers, working hard.

I want you to know we are very regretful. It was a very serious mistake. I guarantee you that it will not happen again.

THE COURT: Government's position.

MR. YOUNG: Your Honor, no specific recommendations.

THE COURT: All right. Counsel, do you know any reason why your client should not be sentenced at this time?

MR. GONZALES: No, Your Honor.

THE COURT: It is the order of the Court the defendant shall be sentenced to six months custody with the Bureau of the Prisons.

Upon release from custody, he will be placed on supervised release, which will be pursuant to the standard conditions that have been adopted by this Court.

While on supervised release, the defendant shall not commit another federal, state or local crime, shall comply with the mandatory standard conditions that

have been adopted by this Court, and the defendant will be required to perform 100 hours of community service as approved by the probation officer, to be completed six months before the termination of probation. It is suggested that this community service — or rather, within six months of the commencement of the supervised release term. It's suggested this community service be performed in an environmental-related agency.

The Court finds the defendant has the ability to pay fine. A $5,000 fine is being instituted and ordered and due immediately.

It is further ordered that the defendant shall pay to the United States a special assessment of $50, due immediately.

Also, the defendant is not a citizen of the United States; therefore, a felony conviction may lead to your deportation from the United States.

If you are deported, you are not to re-enter the United States illegally; and if you do so enter the United States illegally, you are to immediately report to the nearest probation office, at which time supervision will immediately reinstate.

Anything further from the government?

MR. YOUNG: Your Honor, with regard to all three, I have a motion.

THE COURT: What is the motion?

MR. YOUNG: A motion pursuant to the plea agreement to dismiss Counts 1, 2 and 3.

THE COURT: All right. Hand them up.

Anything further from the government?

MR. YOUNG: No, Your Honor.

THE COURT: Anything further from the defense?

MR. GONZALES: No, Your Honor.

THE COURT: Thank you. We will stand adjourned in this matter.

(Conclusion of Sentencing)

CERTIFICATION

I, FRED WARNER, Official Court Reporter for the United States District Court for the Southern District of Texas, Houston Division, do hereby certify that the foregoing pages 1 through 5 are a true and correct transcript of the proceedings had in the above-styled and numbered cause before the Honorable DAVID HITTNER, United States District Judge, on the 5th day of October, 1998.

WITNESS MY OFFICIAL HAND at my office in Houston, Harris County, Texas on this the 24th day of December, A.D., 1998.

/s/ Fred Warner

Fred Warner, CSR

Official Court Reporter